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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051465
Party	Defendant EDGE GAMES, INC.
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Submission	Reply in Support of Motion
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Attachments	7158718_Reply to Opposition to Motion for Reconsideration.pdf ( 8 pages ) (45843 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No. 3,559,342  
For the Trademark THE EDGE  
Issued January 13, 2009

In the Matter of Registration No. 3,381,826  
For the Trademark GAMER'S EDGE  
Issued February 12, 2008

In the Matter of Registration No. 3,105,816  
For the Trademark EDGE  
Issued June 20, 2006

In the Matter of Registration No. 2,251,584  
For the Trademark CUTTING EDGE  
Issued June 8, 1999

In the Matter of Registration No. 2,219,837  
For the Trademark EDGE  
Issued January 26, 1999

<b>EA DIGITAL ILLUSIONS CE AB, a Swedish Corporation; ELECTRONIC ARTS INC., a Delaware corporation,</b>	)	<b>REGISTRANT'S REPLY TO PETITIONERS' OPPOSITION TO MOTION FOR RECONSIDERATION</b>
<b>Petitioners,</b>	)	
<b>v.</b>	)	
<b>EDGE GAMES, INC., a California corporation</b>	)	
<b>Registrant.</b>	)	
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	)	
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Trademark Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1451  
Alexandria, Virginia 22313-1451

## I. INTRODUCTION

Petitioners' argue in their Opposition to Applicant's Motion for Reconsideration that Applicant's motion should be denied because *stare decisis* does not apply and that the December 2008 Velocity/Edge Federal Court ruling should be ignored. Petitioners' arguments are without merit, their statements are inaccurate, the doctrine of *stare decisis* is valid and should be applied, consequently the Velocity/Edge fully litigated decision should be allowed to stand and Registrant's motion should be granted.

## II. ARGUMENT

Contrary to Petitioners' argument, *stare decisis* is entirely valid in this instance. Petitioners emphasize that *stare decisis* applies to *decisions of law* as if the Velocity/Edge ruling was not a decision of law and hence the doctrine of *stare decisis* may not be invoked. However, this is clearly not the case: the Virginia District Court ruled based on the facts, evidence and argument presented to it with reference to U.S. trademark law, and ruled accordingly on the merits. Thus the ruling the court made in the Velocity/Edge case *was* a decision to which *stare decisis* may be applied in binding that decision on other similar courts or lower courts in the same jurisdiction (which the TTAB is).

TMEP 1217 entitled "***Res Judicata, Collateral Estoppel and Stare Decisis***" specifically states where discussing instances where the parties are not the same (emphasis added):

The examining attorney should not invoke res judicata based on an inter parties case or a federal court proceeding involving the applicant, since there is no identity of parties. In this situation, the examining attorney may rely on stare decisis. *In re Alfred Dunhill Ltd.*, 224 USPQ 501, 503 n.7 (TTAB 1984); *In re Multivox Corp. of America*, 209 USPQ 627 (TTAB 1981); *In re Bordo Products Co.*, 188 USPQ 512 (TTAB 1975).

Further in discussing where and when it is appropriate to apply *stare decisis*, TMEP 1217 states (again, emphasis added):

*Stare Decisis.* Stare decisis provides that when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same, regardless of whether the parties and properties are the same. *In re Johanna Farms Inc.*, 8 USPQ2d 1408 (TTAB 1988).

Clearly the intention is that it is entirely appropriate to invoke stare decisis where there is a common registrant and two different petitioner's who both sought to cancel registrant's mark(s) based on substantially the same facts. And this doctrine is specifically designed to be invoked in circumstances exactly like this where there is a common registrant, where the registrant has previously gained a decision in its favor stating it did not commit fraud and it has not abandoned its marks, precisely to avoid the situation now being faced where another petitioner seeks to argue all over again registrant has committed fraud and/or abandoned its mark(s) based the same facts.

As Registrant pointed out in its motion, an opposing party seeking to avoid application of the doctrine bears a heavy burden:

**[I]t is incumbent upon the party seeking to avoid the application of this doctrine . . . to persuade the Board that the issue in the instant proceeding is different or that the facts, situation or principles upon which the prior decision was based have changed or that the circumstances that existed at that time have become so exacerbated in the ensuing years that the decision in point has lost in time whatever viability it may have had or that the interplay between the parties since that time has demonstrated a side-by-side tolerance of the parties for one another so that the equities in favor of affording applicant a further opportunity to register its mark are greater than those in favor of precluding possible further litigation and burden on [the Applicant].**

*In re Multivox of America*, 209 U.S.P.Q. 627 (TTAB 1981) at 630-31.

Once Registrant invoked the doctrine of *stare decisis* the onus then fell on Petitioners to avoid the application of this doctrine by persuading the Board that the issues in the instant proceeding are different, or that the facts, situation or principals are different in this case compared to the Velocity/Edge case, or that circumstances existed in December 2008 that had changed a few months later by September 2009 when Petitioners' filed the instant petition. However, Petitioners have not bothered to argue any of the above, quite simply because they are aware that in the instant action the issues are identical (Petitioners like Velocity argues Registrant had committed fraud on the PTO or had abandoned its marks), the facts are not just substantially the same but are identical, and Petitioner cannot present a single example of how the facts, situation, principals or circumstances have changed at all since the Virginia Court ruled in December 2008.

Finally, despite Petitioners' attempt to argue to the contrary, the Velocity/Edge matter was fully litigated and the order in that matter specifically states (emphasis added):

**(4) [...] Edge Games, Inc, [...] are deemed to have defended and succeeded on the merits with respect to the Complaint.** (Final Order by Judge Spencer).

The parties to the Velocity/Edge case did complete discovery and the merits of the case were argued before the Judge in chambers. The matter was thus fully litigated irrespective of what Petitioners' may seek to allege to the contrary. The simple fact of the matter is that the District Court Judge ruled that Edge Games, Inc. was deemed to have defended and succeeded on the merits in respect to Velocity Micro, Inc's Complaint, and in stating this the Judge was confirming that in his opinion the case was fully litigated. Petitioners have no standing to question the Judge's ruling or the fact that the Judge stated the case should be considered to have been fully litigated. The Velocity/Edge proceedings were not voluntarily dismissed as Petitioners' falsely state.

Registrant further notes that in the cases cited above in respect to where the TTAB has previously invoked and respected the doctrine of *stare decisis* it has consistently been applied where there are stipulated judgments equally as where there are final judgments that are not a result of settlement between the parties. Thus the fact that the final order in the Velocity/Edge matter was part of a stipulated settlement does not mean *stare decisis* may not be invoked nor does it mean that the matter was not fully litigated when the Judge specifically stated it was to be considered fully litigated.

Registrant's point that clearly the Judge in the Velocity/Edge case found "sufficient" evidence to rule that Registrant had neither committed fraud on the PTO in obtaining any of its trademark registrations nor had Registrant abandoned any of its trademark registrations, is a simple application of logic. Obviously since the Judge ruled that the matter was to be considered fully litigated with Registrant having succeeded on the merits in respect to the claims against it of fraud and abandonment, the Judge must have seen sufficient evidence to rule in Registrant's favor on both counts. That is a straightforward logical deduction that does not require Petitioners or the Board to be privy to the evidence in the Velocity/Edge case, or the facts the Judge considered in reaching his conclusion and making his final ruling.

Registrant's application of the doctrine of stare decisis was entirely valid and it does apply in this instance, requiring the Board to accept the decision of the superior court in the same jurisdiction where the prior decision was based on the same issues and substantially the same facts even if the parties were different and at least the one party, the Registrant, is the same. Here the issues are identical (both Velocity and Petitioners allege Registrant committed fraud and abandoned its marks), the registered trademarks are the same and the facts are not only similar, they are identical.

Contrary to what Petitioners claim, they have not gained any common law rights in Registrant's registered trademarks "THE EDGE" or "EDGE" either in the form "EDGE" or the form "Mirror's EDGE" since a party using another party's registered mark in U.S. commerce in infringement of that other party's registered trademark rights does not accrue any common law rights in the use of that mark.

### III. CONCLUSION

Registrant's arguments have clear basis in law and fact and its Motion for Reconsideration should be granted. On the basis of *stare decisis* the Velocity/Edge District Court decision made just a few months before the instant petition stating that Registrant neither committed fraud on the PTO nor abandoned any of its registered trademarks should be allowed to stand, and consequently the Petitioners' petition should be dismissed with prejudice.

Date: April 30, 2010

Respectfully submitted,



By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2010, a true and correct copy of the attached Registrant's Reply to Petitioners' Opposition to Motion for Reconsideration in respect to Cancellation No. 92051456 filed by Edge Games, Inc., a California corporation, has been served by mailing said copy on April 30, 2010, via U.S. mail, postage prepaid, addressed to:

Cooley, Godward, Kronish LLP  
Attn: John W. Crittenden  
101 California Street, 5<sup>th</sup> Floor  
San Francisco  
CA 94111-5800

A handwritten signature in black ink, appearing to read "Tim Langdell". The signature is stylized with a large, sweeping initial "T" and "L".

Dr. Tim Langdell  
CEO, Registrant in *pro se*